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No. 00-183

In the Supreme Court of the United States

SAMUEL WHITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court committed plain error by sentencing petitioner to life imprisonment, where the quantity of drugs involved in petitioner's conspiracy offense, in violation of 21 U.S.C. 846, was not found by the jury.

2. Whether the district court clearly erred in finding that petitioner's offense involved more than 150 kilograms of cocaine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 211 F.3d 1022. The opinion of the district court (Pet. App. 16-55) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2000. The petition for a writ of certiorari was filed on July 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of one count of conspiracy to distribute more than 500 grams of cocaine, in violation of 21 U.S.C.

846. He was sentenced to life imprisonment, five years' supervised release, and a $50 special assessment. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner was the leader and organizer of a drug trafficking conspiracy that included Necole Lamb and Helen Jackson. Pet. App. 2-4. The indictment charged petitioner with one count of conspiring to distribute "controlled substances, including more than 500 grams of cocaine," in violation of 21 U.S.C. 846. Pet. App. 18. Pursuant to 21 U.S.C. 851(a)(1), the government subsequently filed a notice of penalty enhancement based on petitioner's prior felony drug conviction. Gov't C.A. Br. 2. At trial, petitioner did not request an instruction requiring the jury to find the quantity of drugs involved in his offenses, and the court gave no such instruction. Pet. App. 12. The jury found petitioner guilty as charged. *Id.* at 7.

At sentencing, Ruby Lamb testified that, between 1989 and 1991, she and petitioner traveled to Florida at least 30 times, purchasing between 15 and 20 kilograms of cocaine on each occasion. While acknowledging that Ruby Lamb had suffered a nervous breakdown and testified inaccurately about some matters, "the Court finds that she was attempting to be forthright and the Court has no doubts that she did in fact travel with [petitioner] on numerous occasions in 1989, 1990 and early 1991 to purchase large sums of cocaine with [petitioner]." Pet. App. 30. Based in part on Ruby Lamb's testimony, the Court found petitioner responsible for at least 150 kilograms of cocaine. *Ibid.* That quantity resulted in a base offense level of 38, which the court increased by four levels under Guidelines § 2D1.1(b)(1) for possession of a firearm, and by another two levels under Guidelines § 3B1.1 for petitioner's leadership role in the offense. Pet. App. 54-55. Based on a criminal

history category of IV, petitioner's sentencing range was 360 months to life imprisonment. Presentence Report (PSR) ¶ 96. The court sentenced petitioner to life imprisonment. Pet. App. 1.

2. The court of appeals affirmed. Pet. App. 1-15. Relying on its decision in *United States* v. *Jackson*, 207 F.3d 910, 920-921 (7th Cir. 2000), pet. for cert. pending, No. 99-10055, the court of appeals rejected petitioner's claim that the amount of drugs for which he was responsible was a matter for the jury. Pet. App. 9 n.10. The court of appeals further held that the trial court did not commit clear error in determining that petitioner was responsible for conspiring to distribute more than 150 kilograms of cocaine. *Id.* at 13-15.[1]

ARGUMENT

1. a. Petitioner argues (Pet. 22-25) that his sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the government did not prove to the jury beyond a reasonable doubt the quantity of drugs involved in petitioner's offenses. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

Petitioner's life sentence is authorized by Section 841(b)(1)(A), which provides that when a violation of Section 841(a) involves certain threshold quantities of drugs—five kilograms or more of cocaine, for

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[1] The court of appeals also held that the trial court did not commit plain error in instructing the jury that petitioner was involved in a single conspiracy. Pet. App. 10-13. Petitioner does not challenge that ruling in this Court.

example—the penalty range is ten years to life imprisonment, and if the defendant has a prior felony drug conviction, 20 years to life imprisonment. 21 U.S.C. 841(b)(1)(A).[2] His sentence is not authorized, however, by Section 841(b)(1)(C), which authorizes "a term of imprisonment of not more than 20 years" for a defendant who has been found guilty of a drug offense involving *any* quantity of a Schedule II controlled substance, or "a term of imprisonment of not more than 30 years" for a defendant who commits such an offense after a prior conviction for a felony drug offense. Because the life sentence imposed on petitioner exceeded the prescribed statutory maximum for the type of drug involved without a showing as to quantity (see 21 U.S.C. 841(b)(1)(C)), imposition of that sentence on the basis of a drug quantity determination made by the court was error under the Court's decision in *Apprendi*. This case should accordingly be remanded to the court of appeals for further consideration in light of *Apprendi*.

b. Petitioner did not raise his constitutional claim before the district court. Pet. C.A. Br. 13; Gov't C.A. Br. 12. His claim therefore may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Norby*, 2000 WL 1277211, at *6 (9th Cir. Sept. 11, 2000); *United States* v. *Meshack*, 2000 WL 1218437, at *12 (5th Cir. Aug. 28, 2000). The error in imposing a life sentence

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[2] The PSR relied (PSR ¶ 95) on Section 841(b)(1)(B), which provides that where a Section 841(a) offense involves certain threshold quantities of drugs—500 grams or more of cocaine, for example—the penalty range is 5 to 40 years' imprisonment, and if the defendant has a prior felony drug conviction, ten years to life imprisonment. 21 U.S.C. 841(b)(1)(B).

based on quantity findings made by the court at sentencing was "plain," in that it was "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 468 ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); *United States* v. *Norby*, 2000 WL 1277211, at *6. A showing that the district court committed "plain error" in sentencing petitioner will not entitle him to relief, however, unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467. Under the circumstances, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance.

2. Petitioner also argues (Pet. 15-22) that the evidence at sentencing was not sufficiently reliable to justify the district court's finding that petitioner's offense involved at least 150 kilograms of cocaine. We believe that this Court should remand the case to the court of appeals to further consider petitioner's sentence in light of this Court's decision in *Apprendi*, and that petitioner's fact-bound evidentiary contention plainly does not warrant this Court's review.

CONCLUSION

With respect to petitioner's claim that the district court erred by sentencing him to life imprisonment in the absence of a jury finding concerning the quantity of drugs involved in his offense, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In all other respects, the petition should be denied.

Respectfully submitted.

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